



Cayman Islands: Overhaul of Insolvency Legislation modernises process, regulates practitioners and promotes cross-border co-operation

When a Caymanian says ‘soon come,’ the last thing he means is that the event in question will occur anytime soon. It has been said that the expression means something similar to the Spanish ‘mañana’ – but without the sense of urgency. But the introduction of a new insolvency regime in the Cayman Islands really is coming very soon – on 1 March 2009 to be exact. With the publication in an ‘extraordinary’ or special issue of the Cayman Islands Gazette published on Friday 23 January, of three new sets of rules and an amendment to the Grand Court Rules, the overhaul of Cayman’s insolvency regime is achieved. Amendments to the Companies Law that were enacted in 2007, but not brought into force pending the preparation of the rules, will now enter into effect on 1 March 2009, at the same time as the new rules.

The new rules are:

- The Companies Winding-up Rules 2008
- The Insolvency Practitioners’ Regulations 2008
- The Foreign Bankruptcy Proceedings (International Co-operation) Rules 2008
- The Grand Court (Amendment No. 2) Rules 2008

Until now, insolvency procedure in the Cayman Islands has been governed by what can only be described as something of a fudge. Order 102, rule 17 of the Grand Court Rules provided that “all proceedings concerning or arising out of the liquidation of any company shall, so far as practicable, be made in accordance with The

Insolvency Rules 1986 (S.I. 1986/1925) [of the United Kingdom] insofar as such rules are not inconsistent with the Law or such other rules as may be applied to the proceeding in question.”

Although this was somehow made to work tolerably well for many years, it was clearly less than satisfactory, not least because of the significant differences between the substantive insolvency law of England and the Cayman Islands, which meant that large sections of the Insolvency Rules 1986 were irrelevant or inapplicable. Both a committee of private sector practitioners in 2002 and the government’s Law Reform Commission in 2006 recommended, along with the modernisation of Cayman’s substantive law of insolvency, the adoption of specific insolvency rules for the jurisdiction. They also recommended the codification of the extensive cross-border co-operation in insolvency cases that was already taking place.

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Similar uncertainty historically surrounded the question of the qualifications to act as liquidator of a company, particularly in a jurisdiction that does not have its own insolvency practitioner or accountancy qualification. The Grand Court was simply empowered to appoint such persons as it thought fit. The opportunity has been taken to introduce some specific criteria for eligibility, and also to codify the rules relating to liquidators' remuneration.

The new rules and regulations, together with the replacement of Part V of the Companies Law (dealing with insolvency generally) and the introduction of Part XVI (dealing with international co-operation), represent a major enhancement of the Cayman Islands' legislative framework. They provide the jurisdiction with an up-to-date and well thought-out insolvency regime specifically tailored to meet the needs of users of the Cayman Islands as a major financial centre.

A summary of each set of rules is outlined, as follows:

The Companies Winding-up Rules 2008

These rules, to be cited as 'CWR,' represent the first procedural rules for insolvency matters specifically adopted for the Cayman Islands. They replace the UK's Insolvency Rules 1986 (S.I. 1986/1925) ('IR86') in relation to all proceedings commenced, and all steps taken in existing proceedings, after 1 March 2009.

In many areas, particularly where the underlying law is similar, the CWR closely follow the terms of the IR86 (specifically Part 4, being the part of IR86 dealing with the winding up of companies), with only minor local modifications. These areas include:

- the form, content and service of statutory demands;
- the presentation, filing, advertisement and hearing of winding-up petitions;
- the appointment and removal of official liquidators;
- the holding of meetings of creditors or contributories;
- the filing and determination of proofs of debt and related appeals;
- mutual credit, set-off and netting;
- interest; and
- the collection and distribution of assets.

Even in these areas there are differences. A line-by-line comparison is beyond the scope of this article. There is no substitute for detailed review of the new rules with regard to the circumstances of each particular case. Other parts of the CWR are intended to address procedures that differ from those available in England & Wales, such as voluntary winding up subject to court supervision, or petitions presented by the Cayman Islands Monetary Authority, or adopt significantly different approaches to particular topics. Selected highlights in these areas are set out below.

Contributories' petitions: these are covered by CWR O. 3, r. 11-12, in rather different terms to IR86 rules 4.22 and 4.23. In particular, the directions to be given by the court are required to address whether the company can properly participate in the proceedings or is to be treated merely as the subject matter of the proceedings, and

whether the petition should be treated as a proceeding against the company or as one between particular members of the company.

Monetary Authority petitions (CWR O. 3, r. 13–15): the special rules for this type of petition (usually brought under a power granted to the Authority under one of the regulatory laws and in relation to a regulated entity) provide for the service and filing of the petition, the giving of directions for the hearing of the petition, and for any member, director or professional service provider of the company to appear at the hearing, having first given three days' notice.

Sanction applications: CWR O. 11 provides a specific regime for the making of applications by official liquidators for the court's approval of a specific course of action, or by the liquidation committee or specific creditors to compel or prevent such a course of action. These applications are collectively defined as 'sanction applications,' and the rules specify who must be served, who may be heard and what evidence is to be adduced. Sanction applications will generally be heard in chambers.

Payment of dividends: a significant difference between the way this is addressed in CWR O.18 and IR86 Part 11 is that the latter's requirement (absent specific circumstances laid down in the rules) that the official liquidator pay each dividend within four months of the last date for proving in relation to that dividend has not found its way into the CWR at all. The official liquidator must still give notice of his intention to declare a dividend and set a last date for proving, but there is no specific time within which it must then be paid. This may have been to allow greater flexibility in cross-border cases, where it is desirable to co-ordinate with foreign procedures applying to related estates and those procedures make a set time limit difficult to operate.

International protocols: official liquidators of Cayman companies that are the subject of parallel insolvency proceedings in another jurisdiction, or whose assets overseas are subject to foreign bankruptcy or receivership proceedings come under a new duty contained in CWR O. 21, r. 2. They are now obliged to consider whether it is appropriate to enter into an international protocol with any foreign officeholder. If they do, rule 3 sets out the areas such a protocol may cover. Such protocols have to be approved by the court and cannot exclude the jurisdiction of the court.

Unclaimed dividends and undistributed assets: the question of what to do with amounts of money left over at the end of a liquidation because, for example, dividend cheques sent to creditors have been returned undelivered or have not been presented often exercises the minds of official liquidators. CWR O. 23 now provides a specific regime for this situation, involving a post-liquidation trust. The former liquidator holds the assets on trust for the creditors of the now-dissolved company for one year after the dissolution. Provision is made for the payment of his fees for so acting. If the assets are still unclaimed after a year, they pass to the Financial Secretary, to be administered by him under the Public Management and Finance Law.

The Insolvency Practitioners' Regulations 2008

For the first time, insolvency practitioners in Cayman will have to meet defined criteria for appointment as official liquidators. Those criteria relate to four areas: professional qualifications, residence, independence and insurance.

Professional qualifications. A person must either:

- (a) be licensed as an insolvency practitioner in England & Wales, Scotland, Northern Ireland, the Republic of Ireland, Australia, New Zealand or Canada; or
- (b) be qualified as a professional accountant by a 'relevant institute,' in good standing with such institute, have a minimum of five years' experience in the restructuring or winding-up of businesses and be credited with not less than 2,500 chargeable hours of work in that area. ('Relevant institute' is defined as an institute listed in Schedule 2 of the Public Accountants Law, but this is an error in the drafting, as that schedule was repealed in 2008. The right to approve accountancy institutes for the purposes of qualification to practise in Cayman is now vested in the Council of the Cayman Islands Society of Professional Accountants. The Regulations will presumably be amended in due course to correct this point.)

There is, however, a 'grandfathering' provision, in that anyone who has been appointed by the Court as an official liquidator of a company at any time within the five years immediately preceding the commencement date (i.e. since 1 March 2004) remains eligible for appointments.

Residence. It will be a condition of appointment that a person is resident in the Cayman Islands and that he, or his firm, has the appropriate 'trade and business licence.' However, a foreign practitioner who meets the independence and insurance requirements described below may be appointed jointly with a local practitioner who is eligible for appointment under the rules, but not as sole official liquidator. This reflects and codifies the current practice of the Grand Court.

Independence. A person who is not independent of the debtor company may not be appointed. Specifically, if a practitioner or his firm has audited the company in the last three years he is excluded.

Insurance. Insolvency practitioners will now have to have professional indemnity cover of at least US\$10 million per claim and US\$20 million in aggregate with a deductible of not more than US\$100,000. The Court can require higher limits of cover in specific cases. Practice Direction No. 1 of 2003 already requires cover of at least US\$10 million per claim but the requirements as to overall cover and level of deductible are new.

The other main area covered by the new regulations is the remuneration of official liquidators. Regulations 10 to 15 broadly follow the current approach, where ultimate control over remuneration rests with the Court. The Regulations take account of the fact that the new Companies Winding-up Rules (CWR) formally establish the concept of Liquidation Committees, and provide for the negotiation, conclusion and approval by the Court, of a 'remuneration agreement.' This can provide for remuneration on the basis of time spent, percentage of distributions, percentage of realisations, a fixed fee or any combination of those methods. The Schedule to the Regulations sets limits in each type of case. For remuneration by time spent, a range is set for each of a number of

levels of staff. Remuneration agreements concluded under the Regulations cannot require Official Liquidators to accept less than the lower end of those ranges, nor can the liquidation committee agree to pay more than the top of the range.

It is notable that the regulations refer to the committee 'agreeing to pay': in fact the committee's approval, both of the basis of **remuneration** and the amount sought by the liquidator for a given period, is not conclusive. The liquidator still has to apply to the court, providing the court with the report and accounts already given to the committee and evidence of the committee's position. If the liquidation committee's approval is not forthcoming, the official liquidator has to apply to the court for the determination of the matter.

Where there is no liquidation committee, provision is made for a meeting of the creditors or contributories to be held and for their views to be taken.

The provisions of the regulations relating to appointment of liquidators apply to appointments after 1 March 2009. Those relating to remuneration agreements and approval of rates of remuneration apply to work done after that date. The provisions concerning approval of payments in respect of remuneration apply to all applications made after that date.

The Foreign Bankruptcy Proceedings (International Co-operation) Rules 2008

These Rules regulate applications made under the new Part XVI of the Companies Law, and come into operation on 1 March 2009 along with Part XVI itself. They comprise only three operative provisions.

Rule 2 lays down the procedure to be followed on an application by a foreign representative for a declaration that he is entitled to act on behalf of a debtor. It prescribes the contents of the petition by which such applications are to be made and the evidence that must be filed in its support. Notably, this includes an affidavit of foreign law explaining the powers and duties of the foreign representative under the law of his place of appointment.

Rule 3 makes similar provision in relation to applications for ancillary orders such as injunctions, orders for stay of enforcement, examination or delivery up of property. These applications are made by originating summons and must be supported by an affidavit setting out the basis on which it is alleged that the order should be made against the particular respondent, as well as an affidavit of foreign law as under Rule 2.

Rule 4 requires any Cayman company, and any foreign company registered in Cayman, that is made the subject of foreign bankruptcy proceedings to give notice of that fact to the Registrar and advertise it in the Cayman Islands Gazette.

The Appendix to the Rules contains prescribed forms of the various orders. It is notable that the headings of all the prescribed orders begin 'In the Grand Court of the Cayman Islands, Financial Services Division.' There has not to date been any announcement of the establishment of such a division.

The Grand Court (Amendment No. 2) Rules 2008

Because the Grand Court Rules are a comprehensive procedural code used by practitioners on a daily basis both in court and in their offices, amendments are always made by replacement of entire Orders within the GCR, enabling the substitution of the relevant pages in printed copies. Accordingly, these Amendment Rules replace the existing Orders 1 and 102 of the GCR with new versions set out in an appendix, even though the changes are relatively minor and entirely consequential upon the introduction of the Companies Winding-up Rules 2008. They also revoke Practice Directions 1 of 2003 (Official Liquidators: Security for the Due Performance of their Duties) and 1 of 2006 (Liquidators' Remuneration), both of which subjects are now dealt with by the Insolvency Practitioners' Regulations 2008.

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